LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 20 19
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM 1961

No. 683

RAUL PINTO,
against *Petitioner,*
STATES MARINE CORPORATION OF DELAWARE,
Respondent.

GEORGE HOOPER,
against *Petitioner,*
TERMINAL STEAMSHIP COMPANY,
Respondent.

GEORGE EZEKIEL,
against *Petitioner,*
VOLUSIA STEAMSHIP CO., and
SUWANEE STEAMSHIP CO.,
Respondents.

GEORGE RICHTER,
against *Petitioner,*
MATHIASEN'S TANKER INDUSTRIES, INC., and S.S. MICHAEL J, her engines, hull, tackle, cargo and her appurtenances thereof.
Respondents.

BRIEF ON BEHALF OF RESPONDENT TERMINAL STEAMSHIP COMPANY IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT M. PELLEGRINO,
Proctor for Respondent,
Terminal Steamship Company,
67 Wall St.,
New York 5, N. Y.

On the Brief,
ALBERT D. KOCH.

INDEX

	PAGE
Counter-Statement of Questions Presented	2
Statement of Facts as to Petitioner, George Hooper	2
Reasons for Denying the Writ	
Point I—The Decision of the Court of Appeals is Consistent With and In No Way Violates the Teachings of the United States Supreme Court	5
Point II—The Facts in Evidence Do Not Establish Any Unseaworthy Condition or Inherent Danger	7
Point III—No Intra Circuit Conflict Exists Within the Second Circuit As To the Questions Allegedly Presented by This Petition for a Writ of Certiorari	9
Conclusion	11

Cases Cited

Alaska Steamship Co. v. Petterson, 347 F. S. 396 (1954)	6
Arena v. Luckenbach S.S. Co., 279 F. 2d 186 (1st Cir., 1960) 279 F. 2d 186, cert. den. 1960, 81 S. Ct. 222	7
Blier v. United States Lines Company, 286 F. 2d 920, cert. den. —— U. S. ——	8
Caraballese v. Naviera Aznar, S.A., 285 F. 2d 355 (2nd Cir., 1960)	8
Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 S. Ct. 926	6, 8
Pinto v. States Marine Corporation of Delaware, 296 F. 2d 1	6
Poignant v. United States (2nd Cir.) 225 F. 2d 595	6

Supreme Court of the United States

OCTOBER TERM 1961

No.

RAUL PINTO,

Petitioner,

against

STATES MARINE CORPORATION, OF DELAWARE,

Respondent.

GEORGE HOOPER,

Petitioner,

against

TERMINAL STEAMSHIP COMPANY,

Respondent.

GEORGE EZEKIEL,

Petitioner,

against

VOLUSIA STEAMSHIP CO., and
SUWANEE STEAMSHIP CO.,

Respondents.

GEORGE RICHTER,

Petitioner,

against

MATHIASEN'S TANKER INDUSTRIES, INC., and S. S. MICHAEL J., her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents.

BRIEF ON BEHALF OF RESPONDENT TERMINAL STEAMSHIP COMPANY IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Counter Statement of Questions Presented

1. No question is presented on behalf of the Petitioner, George Hooper, as to the nature of the warranty of seaworthiness or that the warranty of unseaworthiness may, or may not be invoked only upon proof of negligent causation and notice. The Circuit Court did no more than to affirm that the Trial Court had before it ample evidence upon which to base its conclusions that the storage of the cargo was proper and that no unseaworthy condition was proven to have existed, and that it had ample evidence for holding that if the warranty of unseaworthiness were to ever extend to longshoremen solely on the basis that the cargo to be handled was inherently dangerous, plaintiff's proof fell short of establishing such liability based on any inherent defect in the cargo, improper handling or unusual hazard.

Statement of Facts as to Petitioner, George Hooper

This was a civil action tried by United States District Judge David N. Edelstein without a jury. On March 22, 1961, judgment was entered dismissing the complaint.

Petitioner's case is set forth by Judge Edelstein in his findings of fact as follows:

> "3. The S.S. *Lumber Carrier* loaded its deck cargo on the west coast.
>
> 4. The deck cargo was not out of the ordinary in amount or height on this voyage.
>
> 5. Inspections and survey of the deck cargo aboard the S.S. *Lumber Carrier*, were made on the west coast and the cargo was found to be properly stowed and the vessel seaworthy.
>
> 6. The S.S. *Lumber Carrier* sailed from the west coast and on the voyage in question its first port of call was Bridgeport, Connecticut.

of lumber in such a manner as to enable the ship's gear to lower them over the side.

18. Between 2:30 and 3:30 P.M. on June 27, 1964, Hooper and Gatto were working in the vicinity of the No. 4 and No. 5 hatches preparatory to discharging a draft of lumber some 5' high, and 12' to 14' in length. The draft was loaded fore and aft and the top layer of the after end fanned out, requiring straightening.

19. In the process of preparing the load for discharging, Hooper faced the draft of cargo with his back toward the rail near the offshore side of the vessel, sank a cargo hook into the board furthest away from him and started to pull a plank into position. While in the act of so doing, the footing, consisting of further lumber cargo, shifted so as to cause Hooper to lose his off balance to his side. As Hooper lost his balance, he tried to steady himself by holding on to the hook, but the hook twisted out of the plank and Hooper, with the hook in his hand, fell over the side of the ship into the water, some 35' below.

20. It has not been established by a fair preponderance of the credible evidence that the stowage was improper.

21. It has not been established by a fair preponderance of the credible evidence that the vessel was unseaworthy."

On November 24, 1965, the Circuit Court of Appeals, Chief Judge Lumbard, Circuit Judge Medina and Circuit Judge Waterman, affirmed the decision of the Trial Court.

REASONS FOR DENYING THE WRIT

I. The decision of the Court of Appeals is consistent with and in no way violates the teachings of the United States Supreme Court.

The concepts of law set forth by the Court of Appeals have not been shown to conflict with the United States Supreme Court or with the uniform and prevailing opinion of the Courts of Appeal for any other Circuit. The Hooper case was not in fact determined upon the existence of a temporary condition, or knowledge of that condition, but rather was decided upon the plaintiff's failure to prove that any such condition existed. Respondent respectfully submits that the Court of Appeals was correct in its holding that there was ample evidence upon the record to support the Trial Judge's findings. However, considering in general all the cases presented in the Writ by Petitioners there has been no showing of any reason which would justify the granting of the writ of Certiorari.

The very fact that the four cases grouped together within the petition were all decided against the various appellants by the Court of Appeals for the Second Circuit in and of itself shows that uniformity and not conflict exists within the said jurisdiction. No case within the Circuit has been pointed to by the Petitioners as inconsistent with the positions set down in the cases at bar as to the nature of unseaworthiness. The Petitioners has not alluded to any case from any other Circuit Court which runs a conflicting precedent as to the nature of the warranty has been set forth.

The decisions of the Court of Appeals for the Second Circuit were made in the guiding light provided by the United States Supreme Court and constitute a valid

interpretation within the ray of this beacon, taking full and just heed to such cases as *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926; *Poignant v. United States* (2nd Cir.), 225 F. 2d 505; and *Alaska Steamship Co. v. Petterson*, 347 U. S. 396 (1954).

This is amply demonstrated by the language and explanation found in the following quote in the recent Court of Appeals decision in *Pinto v. States Marine Corporation of Delaware*, 296 F. 2d 1:

> "A conclusion that liability for a temporary condition is not different in legal nature from liability for a permanent one does not mean that the duration of the condition, the measures prescribed for dealing with, and the feasibility of achieving perfect safety at all times, are irrelevant to deciding whether the owner had met his obligation to furnish "a vessel reasonably suitable for her intended service." 362 U. S. at 550. *Poignant v. United States*, 225 F. 2d 505 (2 Cir. 1955), cited with approval in Mitchell, 362 U. S. at 550, n. 12, see also P. 542, had said that a vessel does not become unseaworthy by reason of a temporary condition caused by a transient substance, if even so the vessel was as fit for service as similar vessels in similar service." P. 508, and even Judge Frank's concurring opinion conceded, P. 602, that if defendant were to prove that there were no means, reasonably available, to keep the passageway free of garbage, the existence of the dangerous condition would not have constituted unseaworthiness."

As indicated in *Rhea v. United States Lines Company*, *supra*, at 923, we thus read *Mitchell* as holding that the trier of the facts is to determine whether the emergence and temporary continuance of a slippery or other hazardous condition does or does not leave a vessel "reasonably suitable for her intended service," 362 U. S. at 550, on the

II. The facts in evidence do not establish any unseaworthy condition or inherent danger.

> evidence that whatever might be claimed to be a defect in the vessel had some connection with the occurrence."

The District Court in the case at bar set forth the one sentence which reduces the conflict to its simplest terms: "The mere fact of shifting alone is not enough to sustain plaintiff's burden of proving improper stowage."

The Circuit Court has recently confirmed that a shipowner is obliged only to furnish a vessel and appurtenances reasonably fit for their intended use, and that a ship is not rendered unseaworthy by a temporary condition, if the ship remains reasonably safe. This was the holding in *Blier v. United States Lines Company*, 86 F. 2d 930, cert. den. —— U. S. —— which reviewed the doctrine of unseaworthiness in the light of the Supreme Court decision in *Mitchell v. Trawler Racer, Inc.* 362 U. S. 539. The opinion of Judge Medina emphasized that proof of a condition aboard a vessel does not establish unseaworthiness unless it rendered the vessel not reasonably fit for the voyage.

The respondent's position in the instant case is far stronger, as no dangerous condition has ever been established. The *Blier* decision reaffirms that a shipowner is not required "to furnish an accident free ship".

The Court below recognized the authority of *Caraballese v. Naviera Aznar, S.A.*, 285 F. 2d 355 (2d Cir. 1960), where the question posed was whether or not the owners of a vessel warrant to longshoremen not simply a safe place in which to handle cargo, but cargo which is safe to handle. The Court of Appeals was not so disposed to extend the owners' liability merely on the basis of inherently dangerous cargo, at least not on the facts therein presented, stating "If unseaworthiness may ever be based

solely on a dangerous condition in cargo that is being loaded, there must be more substantial proof than plaintiff offered here."

In the case at bar, the lower Court in commenting on the *Carabellese* case, correctly stated that, "Even assuming that unseaworthiness could be based on any of the hypotheticals advanced by the Court, *plaintiff's proof falls short of establishing liability based on any inherent defect in the cargo, improper handling or unusual hazard*". (Emphasis added.)

III. No intra circuit conflict exists within the Second Circuit as to the questions allegedly presented by this petition for a writ of certiorari.

It cannot be denied that if an "intra circuit conflict" exists as to an important principle, justification would exist for the United States Supreme Court to exercise its discretion and grant a Writ of Certiorari. However, in the petition at bar there is a manifest failure to show any such conflict. Again it is significant to note that Petitioner has failed to direct the Court's attention to one decision from the Second Circuit of the Court of Appeals in conflict with the cases and principles in which he seeks review.

Petitioner has done no more than ask the United States Supreme Court to grant the Writ of Certiorari based on his assertion that an "intra circuit conflict" exists because of the existence of a minority voice heard in dissenting opinions within some of the cases at bar.

In fact the cases cited by Petitioner in support of his request for Certiorari based upon "intra circuit conflict" clearly indicate that to justify review on this basis necessitates the co-existence of two or more inconsistent and contradictory Circuit Court decisions which still possess

vitality and pertain to the same points of law and are concerned with matters of significant importance. These authorities in no way indicate that the mere existence of a dissenting voice, even if constantly asserted, gives rise to a sufficient "intra circuit conflict" justifying Certiorari. In a limited sense, any minority dissent represents "intra circuit conflict" but no amount of semantic juxtaposition can turn this type of conflict into the broader nature of conflict within a Circuit, which would justify review. Respondent respectfully submits that the existing decisions within the Court of Appeals for the Second Circuit are harmonious and constitute a uniform position on the questions allegedly presented herein.

The result manifest in allowing Petitioner's assertion that the presence of a dissent justifies Certiorari, would open the flood gates of endless litigation and require an impossible criteria amongst jurists, that of complete unanimity. It is also significant to note that even if the foregoing standard be permitted, the petition for the Writ of Certiorari in the Hooper case still should not be granted since in this case no dissenting voice exists. It would appear that by virtue of the Circuit Court's affirmance without minority position, that unanimity has been reached and no basis exists for reviewing either the findings of fact or law presented therein.

It is finally submitted that the Court of Appeals was correct in holding that the Trial Court had ample evidence to support its decision.

In a sense, a Petitioner for a Writ of Certiorari brings a class action on behalf of those who are or who might be similarly situated. Since the Petitioner herein, George Hooper, has concededly failed to satisfactorily prove the existence of any inherent defect in the cargo, improper handling or unusual hazard, he does not qualify as the standard bearer for any questions pertinent to the rela-

tionship between the warranty of unseaworthiness and cargo which is inherently dangerous. In any event, if the nature of this relationship be such that liability exists for damages arising by virtue of inherently dangerous cargo, then under the facts surrounding the case at bar, this theory of liability could in no event inure to the benefit of the Petitioner.

Conclusion

No further need for clarification or instruction by the Supreme Court as to a shipowners' duty to longshoremen on board ship, of providing a reasonably safe place to work, has been shown to exist. In the case of Petitioner Hooper, recovery was denied on the basis that there was a failure to prove unseaworthiness based upon improper stowage or the presence of an unsafe place to work, or that the cargo was inherently dangerous or defective.

Respondent prays that the Writ of Certiorari be denied so that its rights be protected. The denial of the Writ as to the Petitioner Hooper, in no way affects any rights of crewmembers and longshoremen engaged in Maritime service. The right to recover in the absence of proof of the condition sought to be recovered from does not exist in law and consequently, that which was never possessed cannot be deprived.

Respectfully submitted,

Ronald M. Pellegrino,
Proctor for Respondent,
Terminal Steamship Company,
Office & P. O. Address,
67 Wall Street,
New York 5, New York.